NO. 47236-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

ANGEL ROSE MARIE NELSON,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY
Case No. 14-1-00594-1

The Honorable Nelson Hunt

BRIEF OF RESPONDENT

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A. INTRODUCTION

The state charged Angel Nelson with two Class C Felonies—Theft in the Second Degree (RCW 9A.56.040) and Possession of Stolen Property in the Second Degree (RCW 9A.56.160)—for taking about $330 worth of gift cards from K-Mart. If she had taken the same amount of cash from the till, she could have been charged with, at most, Theft in the Third Degree, a misdemeanor. RCW 9A.56.050. On Ms. Nelson's motion, the trial court correctly dismissed the charge because the state failed to make a prima facie case that the gift cards in question were "access devices."

B. ISSUE

The state's list of issues is unnecessarily confusing. There is only one issue in this case: Whether the state made a prima facie case that the gift cards in this case were "access device[s]" within the meaning of RCW 9A.56.040 (Theft in the Second Degree) and RCW 9A.56.160 (Possessing Stolen Property in the Second Degree).

C. STATEMENT OF THE CASE

On October 14, 2014, K-Mart store manager Lisa Siller reported that Ms. Nelson's cash register was about $330 short, and the store's loss prevention manager, Charles Smith, investigated. CP 8, 12-13. He reviewed security videos for her shift. Between about 8:30 and 9 p.m., Ms.

Nelson left her register to select three gift cards,[1] then returned to her register and activated the cards without placing money into the register. CP 8, 12. She hid the cards behind her name tag. CP 8, 12.

After watching the surveillance video, Mr. Smith detained Ms. Nelson and contacted the Chehalis Police Department. CP 8. Ms. Nelson signed a written statement for the store admitting that she stole three gift cards in the amount of about $325 in an effort to help a friend who had recently been diagnosed with cancer. CP 17.

Officer James Fithen responded and went to the manager's office, where Ms. Nelson had been detained. CP 8. He handcuffed her, searched her purse, and read her *Miranda* warnings. CP 8. He asked Ms. Nelson what happened, and she told him she was trying to help a friend pay his medical bills. CP 8. Ms. Nelson told him that she had given the cards to her friend but would not disclose his name. CP 8-9. Officer Fithen took her to the Lewis County jail, where she was booked. CP 9. At the jail, Ms. Nelson mentioned that she had two of the gift cards in her wallet. CP 9. Officer Fithen opened her wallet and retrieved those cards. CP 9.

[1] The first gift card was an Amazon brand, and she activated it in the amount of $100. The second card was Master Card brand, which she activated for $206.95. The third gift card was branded Joann's, and she activated it for $25. CP 8-9.

The state charged Ms. Nelson with second-degree theft of an "access device," a class C felony. CP 1-2; RCW 9A.56.040(1)(d), (2).[2] The maximum penalty for this crime is five years imprisonment and a fine of $10,000. RCW 9A.20.021(1)(d). Ms. Nelson moved to dismiss the charge under CrR 8.3(c) and *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), and attached a Declaration of Counsel summarizing the state's discovery and attaching relevant police reports. CP 5-19. Other than stating how the cards are activated, these reports contain no information about how the particular gift cards involved in this case work. Both parties agreed, for purposes of the *Knapstad* motion, that the facts were not in dispute, as per the attached Declaration of Counsel. CP 5-6.

In her motion, Ms. Nelson argued that the state failed to make a prima facie case under the theft statute because a gift card is a cash equivalent, not an "access device." CP 20-25. For that reason, the state had sufficient evidence to charge Ms. Nelson with, at most, misdemeanor third-degree theft of cash or property, not felony second-degree theft of an

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[2] RCW 9A.56.040 provides:

> (1) A person is guilty of theft in the second degree if he or she commits theft of: ... (d) An access device.
>
> (2) Theft in the second degree is a class C felony.

"access device."[3] The state responded that a gift card falls within the meaning of access device and that the situation in this case is "nearly indistinguishable" from a situation in which a defendant steals a credit or debit card because "[b]oth situations involve the unauthorized taking/possession of a card" and because the "card gives the holder access to funds." CP 29-30.

The trial court granted Ms. Nelson's motion to dismiss. It concluded the gift cards were not "access devices" and that the state had insufficient evidence to proceed on either count. CP 34; RP 4. The court reasoned as follows:

> Well, actually, I don't really have any questions. I have always thought—and I've been actually waiting for an opportunity to express these thoughts—that a gift card is not an access device in the way it was intended by the state Legislature, because it doesn't provide access to anything other than what they've already stolen.
>
> So the degree of the theft is determined not by the fact that it's an access device but the amount that was improperly or unlawfully loaded onto the access device. That's all they can get access to. That's all it should be. I don't see that there's any reason to do greater protection because Walmart says: We won't give you cash—Walmart or whatever—but we'll give you a gift card you can use in

[3] After Ms. Nelson filed her motion, the state amended the information to include a second count, possession of stolen property in the second degree under RCW 9A.56.160(c). CP 26-27. To be convicted of that crime, Ms. Nelson also had to have possessed an "access device" within the meaning of RCW 9A.56.010(1). In its ruling, the trial court dismissed both the theft and possession of stolen property charges. CP 34; RP 4. Thus, the state's amended information does not affect this Court's analysis of this case.

> the store or a cash card that you can use in the store for the amount that eventually they determined was stolen.
>
> So I'm granting the *Knapstad* motion, and that will be as to both counts because of that kind of ruling.

RP 4. Later, the court elaborated:

> I want to make it clear that the reason and I think I said this, but it's the amount and the fact that you can't access any more than what the card was loaded with, which was stolen property, which is the reason why it's not an access device in the way this was intended.
>
> I know in [Ms. Nelson's] brief [s]he talked about the difference between this and a debit card, and that's significant because the statute was changed from reading credit card to access device because a credit card and debit card were different. Somebody recognized that, and then the Legislature passed that.
>
> Now, given these cash cards have come along since that time, I just can't buy off on the idea that it's going to elevate every one-dollar theft into a felony just because they load it on an access card and then stop the ability to access anything but that amount.

RP 6.

The state declined to proceed to trial on third-degree theft charges and timely filed a notice of appeal. CP 35; RP 5.

D. ARGUMENT

The trial court was correct. The Washington legislature intended the term "access device" to apply to cards or other instruments linked to an individual's banking-related credit or checking accounts. In

criminalizing the theft of "access devices," the legislature did not intend to punish theft of retailer-issued cash equivalents like gift cards or gift certificates more harshly than the theft of cash itself.

1. *Knapstad* standard

Under Criminal Rule 8.3(c), a defendant "may, prior to trial, move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged." *See also Knapstad*, 107 Wn.2d at 353-53. In this case, both parties agreed the facts were undisputed for purposes of the motion, so the only question is whether the facts relied upon by the state, as a matter of law, establish a prima facie case of guilt. *Id.* at 356-57 (spelling out procedures). For the reasons explained below, the facts on which the state relied do not establish a prima facie case of guilt under either RCW 9A.56.040(1)(d) (theft of access device) or RCW 9A.56.160(c) (possession of stolen access device) because no rational jury could conclude beyond a reasonable doubt that the gift cards in this case are "access devices."

2. The definition of "access device" has *three* elements.

As noted previously, both statutes under which Ms. Nelson were charged—RCW 9A.56.040(1)(d) (theft of access device) or RCW 9A.56.160(c) (possession of stolen access device)—require the state to

prove beyond a reasonable doubt that the items stolen or possessed were "access devices." "Access device" means:

> any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument[.]

RCW 9A.56.010(1). Under this definition, "access device" has three elements. *First*, the device in question must have a certain form—specifically, it must be a "card, plate, code, or account number," or a similar item. *Second*, all the listed items—and any other similar item—must be a "means of account access." The word "other" in the phrase "other means of account access" logically requires that *both* the enumerated items and the catch-all phrase share the characteristic of being a "means of account access." *Third*, the card or other item in question must be able to be used "to obtain money, goods, services, or anything else of value" or to initiate certain kinds of funds transfers.

Throughout this case, the state has ignored or deemphasized the second element—the requirement that the card be a "means of account access." It has offered no proof that the cards involved in this case provide a means of account access in the sense intended by the legislature.

3. To be an "access device," a card must provide a means of access to another person's credit or checking account.

The first step in discerning the meaning of "access device" is to consider the plain meaning of the statute. *See State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The goal of statutory interpretation is to give effect to the Legislature's intent and purpose. *State v. Wilson*, 125 Wn.2d 212, 216, 883 P.2d 320 (1994). This inquiry includes consideration of the statutory text, context, basic rules of grammar, and special usages indicated in the statute. *Id.* at 10 (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 48A:16, at 809-10 (6th ed. 2000)). Context includes related statutes and associated case law, as well as legislative purposes or policies appearing on the face of the statute, and background facts the legislature presumably knew about when it passed the statute. *Id.; see also Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007) ("The meaning of words in a statute is not gleaned from those words alone but from all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.") (internal quotation marks omitted).

The word "account" is not defined in the statute. The word is so generic that, standing alone, it could refer broadly to many different kinds of banking and consumer accounts—anything that involves a formal record of transactions between a consumer and a business or agency: for example, a library account,[4] a gym membership account,[5] or an account for streaming on-line movies.[6] But this is not what the legislature meant when it added the term "access device" to the statutes. It intended the term "access devices" to refer to mechanisms that provide a means of access *to another person's credit or checking accounts*.

a. Legislative backdrop

The legislature was not writing on a clean slate when it added the term "access device" to the theft and possession of stolen property statutes. Instead, it amended those statutes in response to a specific legal problem that resulted when courts held that the existing version of the statute criminalizing theft of credit cards did not cover conceptually indistinguishable debit cards.

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[4] *See, e.g.*, University of Washington Libraries, *Library Account Services*, http://www.lib.washington.edu/about/hours/accounts (last visited September 13, 2015).

[5] *See, e.g.*, LA Fitness, *Member Login Page*, https://www.lafitness.com/pages/login.aspx (inviting prospective members to create an online "account") (last visited September 13, 2015).

[6] *See, e.g.*, Netflix, *Membership and Billing*, https://www.netflix.com/yourAccount) (last visited September 13, 2015).

The previous version of the statute made it a felony to steal credit cards. *See* Laws of 1975, ch. 260, § 9A.56.160(1)(c). By 1990, as ATM machines become common, more than two million *bank machine* or *debit cards* were in circulation. *See generally* 81 Am. Jur. *Proof of Facts* 3d § 2 (2005). But the former version of the theft statute was written to apply only to cards that initiated *credit* transactions. RCW 9A.56.010(3) (1985). Therefore, the state was unable to successfully prosecute cases involving increasingly widespread debit or "bank machine" cards.

The Washington Supreme Court's decision in *State v. Standifer*, 110 Wn.2d 90, 750 P.2d 258 (1988), illustrates this problem. Mr. Standifer stole a Rainier Bank debit card and was convicted under *former* RCW 9A.56.040(1)(c), which stated: "(1) A person is guilty of theft in the second degree if he commits theft of: ... (c) A credit card." *Id.* at 91. The statute defined credit card as "any instrument or device ... issued ... for the use of the cardholder in obtaining money ... on credit." *Id.* The Court held that bank machine cards did not fit within the statutory language and reversed Mr. Standifer's conviction. *Id.* at 93-94.

In response to problems like the one illustrated by *Standifer*, the legislature amended the statute, replacing the term "credit card" with the term "access device." Laws of 1987, ch. 140, § 1(3). The general object of the amended law was to allow officials to prosecute theft of debit as well

as credit cards. This legal and contextual backdrop makes clear that the "accounts" to which the statute refers were people's *banking-related credit or debit accounts*, not more generic payment accounts like those held by the UW Libraries, L.A. Fitness, or Netflix. *See Burns*, 161 Wn.2d at 140 (legislative backdrop and general object of the statute provide helpful context to discern the meaning of words).

b. Related statutes

The more limited meaning of "account" and "access device" is consistent with related statutes, which also provide helpful context. *See State v. Morales*, 173 Wn.2d 560, 567, 269 P.3d 263 (2012), *as corrected on denial of reconsideration* (Mar. 7, 2012) (When interpreting a statute, the court considers not only the statute in question but also "the entire sequence of all statutes relating to the same subject matter.") As a whole, the regulatory scheme in Washington draws a sharp distinction between "access devices"—mechanisms that permit electronic fund transfers to and from credit and checking accounts—and "cash equivalents" such as gift certificates and their modern equivalent, gift cards.

When the legislature refers to access devices, it generally does so in the context of banking-related transactions. *See* RCW 62A.4A-203(2) (using "access device" in the context of regulating banking-related fund transfers); RCW 19.174.060 (issuers of "access devices" must notify

customers "basic safety precautions that the customer should employ *while using an automated teller machine or night deposit facility*.") (emphasis added).

Indeed, RCW 19.174.020 defines "access device" in a way that seems to exclude "gift cards." To fit the definition the device must be "a card, code, or other means of access to a consumer's account … that may be used by the consumer to initiate electronic fund transfers." RCW 19.174.020(2)(a) (incorporating the definition from 12 C.F.R. Part 205). The word "account" in that statute refers specifically to "a *demand deposit (checking), savings, or other consumer asset account … held directly or indirectly by a financial institution*." 12 C.F.R. Part 205.2(b)(1) (emphasis added). Alternatively, to be an "access device," the instrument must be "[a] key or other mechanism *issued by a banking institution to its customer to give the customer access to the banking institution's night deposit facility*." RCW 19.174.020(2)(b) (emphasis added). All of these usages indicate a strong link between "access devices" and bank-held checking and savings accounts, rather than generic retailer-issued consumer accounts.

Moreover, there is no inkling that notice requirements or other regulations governing "access devices" apply to gift certificates or their functional equivalent, gift cards. Indeed, because of the fundamental

difference in the nature of these cards from a regulatory perspective, these laws would make little sense if the meaning of "access device" encompassed ordinary gift cards like those involved in this case. The theft statutes should be interpreted to avoid this sort of discord. *See In re Yim*, 139 Wn. 2d 581, 592, 989 P.2d 512 (1999) (Acts relating to the same subject matter should be read in connection with each other "as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.") (quoting *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974)).

By contrast, when the legislature uses the term "gift card," it treats them not as "access devices" that permit one to gain access to individuals' bank or checking accounts, but instead as intangible personal property. *See* RCW 19.240.005 *et seq.* (regulating gift certificates and their equivalent, gift cards). Thus, gift cards are "records" of promises made by the business to the "bearer" containing "stored value." RCW 19.240.010(4)(a). They are the equivalent of gift certificates. RCW 19.240.010(5). Accounts are never mentioned in these definitions. Indeed, the statute specifies that the issuer of a "gift card" need not "[m]aintain a separate account for the funds used to purchase [it]." RCW 19.240.090(4)(c).

c. Legislative history

To the extent a statute is ambiguous, the Court may wish to consult legislative history, an additional indicator of legislative intent. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). In considering legislative history, the Court may consider any material that is "sufficiently probative" of legislative intent. *State v. Evans*, 177 Wn.2d 186, 199, 298 P.3d 724 (2013) (quoting *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 104–05, 829 P.2d 746 (1992)). This includes legislative bill reports and analyses as well as constituents' testimony on the bill in question. *See Evans*, 177 Wn.2d at 199-202 (relying on those sources to discern legislative intent).

In this case, all the legislative history points in the same direction: The Legislature intended "access device" to refer specifically to mechanisms providing access to a person's credit or checking accounts. As noted previously, the original version of RCW 9A.56.010(1) focused on "credit cards." Laws of 1975, 1st Ex.Sess., ch. 260, § 9A.56.010, eff. July 1, 1976. In 1987, the law was amended to replace the word "credit card" with the broader term "access device." *See* Substitute House Bill 508, 50th Leg. Reg. Session (Wash. 1987).

As the House Bill Report and its attachments make clear, two technological developments related to *the banking industry* drove the

change. First, there was increased use of telephonic credit card transactions. H.B. Rep. on H.B. 508, 50th Leg., Reg. Sess. (Wash. 1987) (Letter from Kurt Hermanns, Senior Deputy Prosecuting Attorney, King County Office of the Prosecuting Attorney at 1). This meant that *cards* were not the only way to access credit accounts; information such as numbers or codes could also be used to initiate a bank account transfer or credit transaction. *Id.* Thus, the new term "access device" encompassed *card numbers* used in telephonic transactions, not just cards. *Id.* Second, as noted previously, the state was unable to successfully prosecute debit card transactions because the previous law was limited to mechanisms used to extend credit. *Id.* The King County Prosecutor's Office described the goals of the legislation as follows:

> Replacing the phrase "credit card" with the phrase "access device" and *defining the new phrase to include direct debit type transactions* is necessary because of recent changes in the *banking* industry. *Many new transactions cards do not involve an extension of credit and thus are not covered by current criminal law.* What is more, the proposed definition of access device includes not only the card itself, but the information necessary to initiate a transfer of funds. Because many merchants and banks now permit telephonic use of *credit and debit type cards*, the cards themselves are no longer necessary to the criminal. It is the information on the card that is essential ...

Id. (emphasis added). The Senate Bill Report for H.B. 508 reiterated these key points, making clear that the legislation was intended to extend to transactions giving access to credit or checking accounts:

> There have been substantial changes and growth in technology relating to credit transactions. The term "credit card" does not adequately define the *many mechanisms by which individuals obtain access to credit or checking accounts*. Changing the definition will enhance the ability of prosecutors to establish certain types of fraudulent transactions.

S.B. Rep. on H.B. 508, 50th Leg., Reg. Sess. (Wash. 1987) (emphasis added).

In sum, the legislative history makes clear that the change from "credit cards" to "access devices" was intended to cover mechanisms enabling certain types of transactions—namely those involving access to other people's bank-related credit or checking accounts. None of the legislative history suggests the legislature intended to sweep gift certificates, gift cards, or other retailer-issued payment mechanisms within the meaning of "access device."

d. Canons of interpretation

In the event that the court finds any remaining ambiguity in the term "access device," it should resolve that ambiguity in the defendant's favor under the rule of lenity. *Payseno v. Kitsap Cnty.*, 186 Wn. App. 465, 470, 346 P.3d 784 (2015). Ambiguous penal statute must be "strictly

construed" in favor of the defendant. *Evans*, 177 Wn.2d at 193. The Court will interpret an ambiguous penal statute adversely to the defendant *only* if statutory interpretation "clearly establishes" that the legislature intended such an interpretation. *Id.* "Requiring a relatively greater degree of confidence when resolving ambiguities within penal statutes against criminal defendants helps further the separation of powers doctrine and guarantees that the legislature has independently prohibited particular conduct prior to any criminal law enforcement." *Id.*; *cf. State v. Rice*, 174 Wn.2d 884, 901, 279 P.3d 849 (2012) (noting "the substantial liberty interests at stake" within the criminal justice system, the "awesome consequences" of criminal prosecution, and thus "the need for numerous checks against corruption, abuses of power, and other injustices" (quoting *State v. Pettitt*, 93 Wn.2d 288, 294–95, 609 P.2d 1364 (1980) (internal quotation marks omitted)). Fair notice is also at the crux of the lenity canon. *See City of Aberdeen v. Regan*, 170 Wn.2d 103, 116, 239 P.3d 1102 (2010) (noting that rule of lenity protects citizens' due-process right to "clearly understand" what conduct gives rise to punishment).

It is hard to imagine that an ordinary person in Ms. Nelson's position could read the theft statutes and "clearly understand" they imposed felony-level criminal liability for stealing gift cards no matter how low their value. This is especially true when those statutes specify

misdemeanor-level treatment for stealing much larger amounts of cash. *See* RCW 9A.56.050 ("A person is guilty of theft in the third degree if he or she commits theft of property or services which … does not exceed seven hundred fifty dollars in value.")

Finally, the absurd results canon, which encourages courts to avoid unlikely or strained interpretation that lead to absurdity, also applies in this case. *See Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). Interpreting "access device" so broadly that it includes gift cards would upset the carefully articulated degrees of theft in the Washington Criminal Code: For example, if the Court accepts the state's proposed interpretation, a person who steals one dollar in the form of a gift card could be punished much more severely than a person who steals up to $750 cash, an unlikely and unjust result that thwarts fundamental goals of criminal law. *See* RCW 9A.04.020 (A basic purpose of the criminal law is to "differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.").

Such an interpretation could also lead to felony criminal convictions based on theft of seemingly omnipresent, yet only marginally valuable, retailer-issued cards of all types—even library or coffee cards. This is surely not a result our legislature intended. It is also one that

borders on absurdity. *See generally* Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 704 (2005) (listing similarly absurd extensions of criminal liability—including a library-related offense—that have turned some state legislatures into academic commentators' laughingstock).

Finally, the state's proposed interpretation exacerbates already entrenched problems of overcharging, unfettered prosecutorial discretion, and coerced plea bargains. *See* Kyle Graham, *Overcharging*, 11 Ohio St. J. Crim. L. 701, 704-05 (2014) (describing overcharging as a phenomenon in which the prosecutor, using his or her discretion, "originally alleges a charge or charges that she subjectively does not want to pursue to conviction, or is at least indifferent about prosecuting. Instead, the extraneous or unduly severe allegations are put forward to incentivize the defendant to plead guilty to another charge or charges."); *see also Lafler v. Cooper*, ____ U.S. ____, 132 S. Ct. 1376, 1397, 182 L. Ed. 2d 398 (2012) (Scalia, J., dissenting) (opining that plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense").

4. The state did not prove that the cards in this case are "access devices."

Applying the principles discussed above, the state has not proven that the retailer-issued gift cards Ms. Nelson stole were "access devices." The state provided enough evidence for a fact finder to conclude that Ms. Nelson stole cards that can be used to obtain something of value—the first and third elements of the definition for an "access device." But it did not—and could not—provide sufficient evidence to prove the second element, namely, that the cards in question provide a means of access to another person's credit or checking account.

Part of the problem is an absence of proof. The state never established how the gift cards involved in this case work, whether they were connected to accounts, or what type of accounts they were connected to. The state makes a number of assertions about how gift cards work, but these are unsupported by citation to any authority. *See* Appellant's Opening Brief at 10-12. More important, these assertions rely on facts not in the record.[7]

The state also never showed that Ms. Nelson did anything other than steal a cash-equivalent. Unlike the cards involved in other "access

[7] To the extent the state's argument relies on facts outside the record, this court should reject it. *See State v. Stockton*, 97 Wn.2d 528, 530, 647 P.2d 21 (1982) ("Matters referred to in the brief but not included in the record cannot be considered on appeal.")

device" cases,[8] the cards she stole did not give her access to anything beyond the cash she stole to "buy" them. The cards in this case were never issued to anyone else, and so they never provided a means of access to anyone else's account—whether credit, checking, or otherwise. Under these circumstances, the state failed to make a prima facie case that Ms. Nelson either stole or possessed stolen access devices. Consequently, the trial court correctly dismissed the charges in this case.

5. The state's argument relies on facts outside the record and is unpersuasive.

The state's argument that the legislature intended to include gift cards within the meaning of "access device" is not persuasive. At the outset of this case, the state did not even recognize that to be an "access device" a card had to provide a "means of account access." For example, in its affidavit of probable cause, it used ellipses to omit that requirement. *See* CP 3-4 (Affidavit of Probable Cause) (representing that an "access device" includes "any card … that can be used alone or in conjunction with another access device to obtain money, goods, services or anything

[8] *See, e.g., State v. Rose*, 175 Wn.2d 10, 12, 282 P.3d 1087 (2012) (unactivated credit card not an "access device" when no evidence that defendant could have activated it); *State v. Chang*, 147 Wn. App. 490, 494, 195 P.3d 1008 (2008) (checking account numbers were access devices); *State v. Clay*, 144 Wn. App. 894, 896, 184 P.3d 674 (2008) (credit card was access device); *State v. Schloredt*, 97 Wn. App. 789, 794, 987 P.2d 647 (1999) (cancelled credit card was "access device").

else of value" and leaving out the critical requirement that card be a "means of account access") (ellipses in original). That omission might have contributed to the initial mistaken charging decision the state is now seeking to uphold. At any rate, it is not surprising the state lacks proof of a statutory element it failed to recognize at the time of the charge.

In its brief, the state now appears reluctantly to embrace the idea that an "access device" must provide a means of account access, but suggests that as long as a card *provides access to funds or benefits of some type* it can be an "access device." However, the state's generalizations about how gift cards work are plucked out of thin air—it has provided no proof about the particular gift cards stolen in this case. *See State v. Rose*, 175 Wn.2d 10, 17, 282 P.3d 1087 (2012) (reversing conviction because state failed to prove how particular inactive credit card involved in case could be used to obtain something of value).

Finally, without explaining what they are, the state alleges generally that the trial court's interpretation leads to absurd results, but makes no effort to address the absurdity of its own interpretation. *See* Appellant's Opening Brief at 8. Under the state's reading, the theft or unauthorized use of Netflix passwords, library cards, and even coffee cards would all justify felony charges, regardless of their value. This cannot be right.

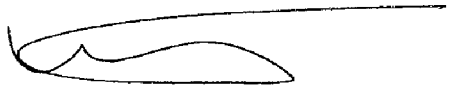
Without additional evidence showing that the particular cards in this case provide access to another person's bank or credit card account, a jury could not conclude beyond a reasonable doubt that the gift cards are "access devices"—an essential element of both charges in this case. The trial court correctly dismissed the charges in this case.

E. CONCLUSION

This Court should affirm the trial court's dismissal of the charges in this case.

Respectfully submitted on September 14, 2015.

LAW OFFICE OF LISA E. TABBUT



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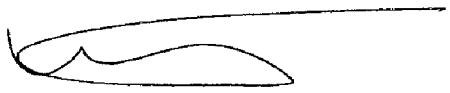
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Respondent to (1) the Lewis County Prosecutor's Office, at appeals@lewiscountywa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Angel Nelson, 212 Valley Meadows Dr., Chehalis, WA 98532.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 14, 2015, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344

COWLITZ COUNTY ASSIGNED COUNSEL

September 14, 2015 - 1:48 PM

Transmittal Letter

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Case Name: State v. Angel Rose Marie Nelson

Court of Appeals Case Number: 47236-8

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lisa E Tabbut - Email: ltabbutlaw@gmail.com

A copy of this document has been emailed to the following addresses:

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